

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

2nd CIRCUIT U.S. COURT OF APPEALS

77-4084

CAROL PRYCE,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITIONER'S BRIEF

NEW YORK, N.Y.
June 10th, 1977

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STATEMENT OF ISSUES

- I. THE EVIDENCE PRODUCED BY THE GOVERNMENT DOES NOT MEET
THE STANDARD NECESSARY TO SUPPORT AN ORDER OF DEPORTATION
- II. THE PETITIONER, CAROL PRYCE, DID NOT HAVE A FAIR HEARING
AND HIS DUE PROCESS RIGHTS HAVE BEEN VIOLATED
- III. THE BOARD OF IMMIGRATION APPEALS ERRED IN THE STANDARD
IT USED TO CONCLUDE THAT THERE WAS CLEAR, CONVINCING
AND UNEQUIVOCAL EVIDENCE
- IV. THE GOVERNMENT HAS FAILED TO PROVE "GAIN"
- V. TO AID AN ALIEN TO IMPROPERLY ENTER THE U.S. OUT OF
MOTIVES OF LOVE, CHARITY OR KINDNESS DOES NOT CONSTITUTE
"GAIN"

STATEMENT OF THE CASE

This is an Appeal from an Order of the Board of Immigration Appeals dated November 22nd, 1976 dismissing an appeal of an Immigration Judge dated June 3rd, 1976 finding the Petitioner, Carol Pryce, deportable as charged, ordering his deportation to Jamaica and denying his application for Voluntary Departure.

The case concerns a 26 year old male citizen of Jamaica, West Indies who, on October 1st, 1973, was admitted into the United States as a returning permanent resident. At the time of his return he was charged with knowingly and for gain aiding, abetting, and assisting an alien to try to enter the United States in violation of Section 241(a)(13) of the Immigration and Nationality Act, 8 USC 1251(a)(13) .

On January 6th, 1975 in the United States District Court for the Western District of New York, Carol Pryce, was found guilty of unlawfully and knowingly attempting to bring into the United States an alien not lawfully entitled to enter or reside in the United States in violation of 8 USC 1324 and 18 USC 371. He was sentenced to one year imprisonment.

A Deportation hearing was held on October 20th, 1976. The decision of the Immigration Judge was rendered on June 3rd 1976 when Carol Pryce was ordered deported from the United States.

This decision was appealed to the Board of Immigration Appeals which rendered its decision on November 22nd, 1976 dismissing the appeal from the Order of the Immigration Judge. Following the Board's decision, a Petition for Review was made to this Court.

STATEMENT OF THE FACTS

Some time prior to October 1973, Carol Pryce was asked by Monica Pryce, apparently his wife, to assist Keith Grizzle, a friend of Monica Pryce to enter the United States. Carol Pryce agreed and later enlisted the aid of Leroy Stefus (Kilo) to supply and drive the automobile from the United States to Canada and back. Carol Pryce procured identification documents including a drivers licence, Xerox employee badge and Blood Donor's card.

Carol Pryce and Leroy Stefus went to Toronto on October 1st, 1973 and attempted to bring into the United States Keith Grizzle. They were arrested by the Immigration authorities. The whereabouts of Leroy Stefus (Kilo) (the driver) is unknown and he was not produced as a witness in the deportation hearing.

Keith Grizzle was paroled into the United States and was a government witness at both the criminal trial of Carol Pryce and the deportation hearing. The charges against Carol Pryce in the District Court case did not involve the issue of gain since it was not an element of the criminal charge. Since Carol Pryce had admitted to essential elements of the deportation charge against him except for "knowingly and for gain" these became the issues to be resolved at the deportation hearing.

The issue of gain, its definition, and the government's

evidence to prove Carol Pryce aided the alien for gain from the main issues before this Court and the Board of Immigration Appeals below.

ARGUMENT

THE EVIDENCE PRODUCED BY THE GOVERNMENT DOES NOT MEET THE STANDARD
NECESSARY TO SUPPORT AN ORDER OF DEPORTATION

No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. Immigration and Naturalization Act, Section 242(b)(4), 8 USC 1252(b)(4)

No deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. WOODBY v. IMMIGRATION, 385 US 276, 17 L.ed 2d 362, 1966. This standard applies no matter how long the alien has resided in this country. WOODBY (supra) page 369, n.19.

The Supreme Court in WOODBY stated,

To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposit to the question before us, we have spoken of the "solidity" of proof that is required for a judgment entailing the consequences of deportation . . . (at page 284, citations omitted)

The Board of Immigration Appeals below based its decision upon a statement made by Monica Pryce, and evidence given by Keith Grizzle and William Devine.

STATEMENT OF MONICA PRYCE

Monica Pryce was either the wife, former wife or common-law wife of Carol Pryce, the Petitioner here. An Immigration and Naturalization Service investigator obtained a statement from Monica Pryce dated November 23rd, 1973 (Record, pages 130-140.) Monica Pryce died on January 30th, 1975. The deportation proceedings in this matter were held on October 20th, 1975.

The Board's decision quotes the testimony of William Devine, the Immigration investigator in regard to Monica Pryce's statement and the issue of "gain" (money) to be paid to Carol Pryce. That portion of the Board's decision is produced below (Record, page 3.)

The investigator, William Devine, when asked by counsel to point out in Monica Pryce's statement where it states that "money was supposed to be paid to Carol Pryce," testified as follows:

A. Right there.

Q. And you are indicating that the second question from the bottom on page 6 in the question and answer of Monica is: "At any of these meetings with Carol Pryce, did you discuss payment of the \$300?" And the answer, "Yes, he said

I would give him the money. When he reached Canada, Keith would give them the money but that they didn't know who them." Didn't know them, who? Could you read that for me, sir, because I can't.

A. At any of these meetings with Carol Pryce, did you discuss the payment of the \$300?" "Yes, he said I would give him the money, when he reached Canada, Keith would give them the money but that don't know them who."

Q. Do you know what that means?

A. Yes, it means that she didn't know who the person particularly Kilo was supposed to get the money.

(This witness identified "Kilo" as Leroy Stefus whose whereabouts at the time of the deportation hearing was unknown. Leroy Stefus drove the vehicle which was used to transport Keith Grizzle across the border.)

It is contended that the Board erred when it characterized the above evidence as clear, convincing and unequivocal. On the contrary, the statement of Monica Pryce is unclear and equivocal.

It is contended that the words of Monica Pryce, "When he reached Canada, Keith (Grizzle) would give them the money but that they didn't know who them" cannot by any fair measure be taken as "clear" evidence of showing gain to Carol Pryce.

The government's own witness, Investigator Devine, took the statement to mean " . . . she (Monica) didn't know who the person particularly Kilo (Leroy Stefus, driver of the car) was

supposed to get the money.

The statement of Monica Pryce at page 135 of the Record reads:

He (Carol Pryce) said, "I get someone who could help, help your friend you know," I (Monica Pryce) said "Unhunh" and he (Carol Pryce) said, Here's what him (Leroy Steffus) say will cost you, \$300."

As with the two portions quoted above, a reading of the entire statement of Monica Pryce fails to produce any clear, convincing, unequivocal evidence that Carol Pryce was to receive and retain any money ("gain") for his aid to Keith Grizzle.

STATEMENT OF KEITH GRIZZLE

A government witness was Keith Grizzle, the person whose attempted entry into the United States was aided by Carol Pryce, the Petitioner.

The Board's decision (Record, page 2) summarizes Grizzle's testimony as including evidence that Grizzle learned from Monica Pryce that he was supposed to pay the \$300 to Carol Pryce, the Petitioner (Record, page 43). Even if this were conceded to be true, then the government has failed to meet its burden since proof of payment to Carol Pryce is not enough to sustain the deportation

order. According to Ribeiro (infra) the government must show that Carol Pryce in turn was not to pay the sum over to Leroy Stefus (Kilo) the driver of the car.

TESTIMONY OF WILLIAM DEVINE

William Devine, an Immigration and Naturalization Service Investigator testified on behalf of the government in order to "corroborate" the statement of Monica Pryce. Mr. Devine was the investigator who took the statement from Monica Pryce. Mr. Devine had no first hand knowledge of the events surrounding the incident. His testimony, in the main, consisted of his interpretation of the meaning to be given to portions of the statement. His evidence as such is conclusary and should have been given no weight. It was of little if any probative value.

It is contended that this reviewing Court, when applying the standard of WOODBURY that the deportation order be founded upon clear, unequivocal and convincing evidence and, the requirement of the Immigration Act that no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence, will agree that the government's evidence against Carol Pryce does not meet those standards.

THE PETITIONER, CAROL PRYCE, DID NOT HAVE A FAIR HEARING AND
HIS DUE PROCESS RIGHTS HAVE BEEN VIOLATED

At the original proceeding below, the statement of Monica Pryce was admitted over the objections of Counsel. The statement was obtained by an Immigration Investigator and is dated November 10th, 1973. It appears in the Record at pages 130 to 140. Monica Pryce died on January 30th, 1975. The deportation hearing was held on October 20th, 1975.

The transcribed statement was never shown to Monica Pryce, she never read the statement nor had an opportunity to correct or amend the statement. Monica Pryce never signed the so called "sworn" statement. (Record, page 70.)

Carol Pryce, the Petitioner, had no opportunity to cross-examine Monica Pryce regarding the statement or the issue of money ("gain".) The Immigration Judge glosses over this objection by referring to the Criminal Trial of Carol Pryce and the cross-examination opportunity in that forum. This way an error since the criminal charges did not concern "gain" and the payment of money has not any issue at the Criminal Trial. An attempt at cross examination the gain issue would have been ruled as irrelevant.

To "corroborate" Monica Pryce's statement the government produced the Investigator who took the statement. Mr. Devine had no first hand knowledge of the facts and so could not improve

the probative value of Monica Pryce's statement nor lessen the unfairness of its use in its untested and unsigned form.

The statement was dated November 10th, 1973. Monica Pryce died on January 30th, 1975, a period of some 14 months later. The government had ample opportunity during that time to have Monica Pryce review and sign the statement. Depositions with cross examinations could have been arranged. Now by its delay and neglect, the government is, in effect, by-passing the requirement of 8 USC 1252 (b) (4) that no decision of deportability should be valid unless based upon reasonable, substantial and probative evidence.

THE BOARD OF IMMIGRATION APPEALS ERRED IN THE STANDARD IT USED TO
TO CONCLUDE THAT THERE WAS CLEAR, CONVINCING AND UNEQUIVOCAL
EVIDENCE.

It its decision (Record, page 5), the Board states:

Upon evaluating and weighing the evidence submitted by the Service and the respondent, pursuant to the above guidelines, we find that the evidence adduced by the Service is more credible than that introduced by the respondent. Based on this finding, we conclude that there is clear, convincing and equivocal (sic) evidence that the facts alleged as grounds for deportation are true.

The Board found that the evidence adduced by the government was "more credible" than that of Carol Pryce. It was an

error for the board to then conclude, ipso facto, that the evidence was clear, convincing and unequivocal.

Credible evidence, even "more credible" evidence does not necessarily reach a clear,convincing unequivocal standard. A reading of the Board's decision leads one to the erroneous conclusion that a party, by having the more credible evidence has thereby met the clear, convincing, unequivocal standard.

It is contended that the Board's error is clear and substantial.

THE GOVERNMENT HAS FAILED TO PROVE "GAIN"

The statute upon which the deportation charge is based includes the element of "gain". Section 241(a)(13) of the Immigration and Naturalization Act (8 USC 1251(a)(13)) reads in part, ". . . who shall have knowingly and for gain, . . . aided any other alien to enter . . . the United States in violation of law."

In Ribeiro v. INS, 531 F.2d 179(1976), the U.S. Court of Appeals for the Third Circuit reversed the Board of Immigration Appeals because the Government failed to prove "gain", an essential element of deportability. The Court stated that the "clear and convincing" test of WOODBURY (385 U.S. 276) requires that the Government shoulder the burden of persuasion that the alien, despite his denials, did in fact act "for gain" (at page 181.)

The Court interpreted the phrase "for gain" as requiring the prospect of any excess of tangible return over expenditure in a particular transaction (at page 180)

Ribeiro was to receive \$150. \$100 was to be paid to the driver of the car. The other \$50 was to be retained by Ribeiro. It was this \$50 that the Government contended constituted "gain"

The record in Ribeiro indicated that the alien would incur expenses. The Court suggested that the Government might be able to meet its "gain" burden by a demonstration that the consideration received was so clearly in excess of the foreseeable expenses claimed that the alien's assertion that he did not anticipate gain must be disbelieved (at page 181.)

In the case now before this Court, Carol Pryce, the Petitioner testified that he was to receive nothing for his services (Record, page 28, line 25)

In the statement of Monica Pryce, there is strong evidence that the person to ultimately receive the entire \$300 "gain" was not Carol Pryce, the Petitioner, but Keith Grizzle, the driver who assisted Carol Pryce.

The statement of Monica Pryce at page 135 of the Record reads:

He (Carol Pryce) said, "I get someone who could help, help your friend you know," I (Monica Pryce) said "Unhunh" and he (Carol Pryce) said, "Here's what him (Leroy Stefus) say will cost you, \$300."

Here, Monica Pryce, the only government witness alleged to have had discussion with Carol Pryce regarding payment, quotes Carol Pryce as stating that the \$300 was the amount demanded by Leroy Stefus, the driver. This is uncontroverted in the Record. The Government was unable to produce Leroy Stefus as a witness.

Even if, arguendo, \$300 was to be paid to Carol Pryce, if he in turn was to pass the \$300 on to Leroy Stefus, as the evidence shows, then according to Ribeiro, no "gain" would accrue to Carol Pryce and the Government's case must fall.

TO AID AN ALIEN TO IMPROPERLY ENTER THE U.S. OUT OF MOTIVES OF LOVE, CHARITY OR KINDNESS DOES NOT CONSTITUTE "GAIN"

In Gallegos v. Hoy, 262 F.2d.665 (1958), the U.S. Court of Appeals for the Ninth Circuit held that Congress by "gain" in the Immigration & Naturalization Act, Section 241(a)(13) did not mean to apply the peppercorn standard of contract consideration. The requirement would be met, however, if the gain is real, moneywise (at page 666.)

Further the Court held that if the bringing in of an alien was for either love, charity or kindness and not for substantial financial advantage, the condition of deportability would not be met. (page 666.)

In the Matter of R-D-, 2 I & N Dec. 758(BIA,1946), the

Board of Immigration Appeals discussed the Congressional intent of adding "for gain" to the Immigration Act. Senator Connally is quoted,

It must be for gain. If a father should be found guilty of slipping into the country his son, his wife or another member of his family, he should not come within this prohibition; but if any alien should sell a passport to another man, and the other man should enter the country on it, the alien would be guilty, and would be deportable. (page 760)

In the case at bar, Carol Pryce has admitted aiding Keith Grizzle to enter the United States. This aiding was done at the behest (Record, page 2) of Monica Pryce who was either Carol Pryce's wife, common-law wife, or his former wife. The Record is inconsistent on this point but the Board in its decision (Record, page 2) characterizes her as his alleged common-law wife.

That Carol Pryce had a close relation to Monica Pryce is totally consistent with his statement that he was to retain no monetary consideration for his aid but was motivated instead by love, charity or kindness for Monica. In accord with Gallegos (supra), "gain" cannot be found nor can deportation order be supported upon such non-monetary consideration.

CONCLUSION

The Immigration & Nationality Act renders an alien deportable if he knowingly and for gain aids and abets another alien to enter the United States unlawfully. The Congressional history of this provision clearly shows the intent of Congress was to render amenable to deportation, persons who for mercenary and venal gain aid aliens to enter the United States in violation of law. It was not intended to banish from our shores a person who attempted to help his friend or family member to enter the United States for consideration of love, charity or kindness. The Record of this case clearly establishes that Carol Pryce was aiding a person at the request of his wife. The Record, at best, is unclear and equivocal regarding monetary gain. There is no clear, convincing and unequivocal evidence showing that Carol Pryce was to receive and retain any monetary consideration.

The main source of such evidence as the government was able to produce was in the form of an unsigned, uncorrected statement of a person deceased at the time of the deportation hearing. Carol Pryce, because of the government's delay and negligence had no opportunity to examine or otherwise test the probative value of Monica Pryce's statement. It is contended that the "solidity" of proof required for a judgment entailing the consequences of deportation does not appear on the Record

of this case. The Board of Immigration Appeals made a logical error and an incorrect quantum leap by concluding that the party with the "more credible" evidence has thereby produced clear, convincing and unequivocal evidence.

Based upon the entire Record of this case this Court should find that the deportation order was not based upon reasonable, substantial and probative evidence and further that the facts alleged as grounds for deportation have not been proved by clear, unequivocal and convincing evidence.

WHEREFORE this Court should order that the deportation order against Carol Pryce should be dismissed.

COPY RECEIVED
James P. Fiske Jr.
UNITED STATES ATTORNEY
6/13/77 *[Signature]*

